NO. 82-1919

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In the Supreme Court of the United States

OCTOBER TERM, 1982

MARATHON PIPELINE COMPANY

Respondent,

VERSUS

ROWAN COMPANIES, INC.
and DRILLING RIG ROWAN/ODESSA

Petitioner

ON PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the District Court's sequestration of a fact witness who was not an employee of petitioner violated the provisions of Rule 615 of the Federal Rules of Evidence and, if so, whether petitioner was denied due process of law pursuant to the Fifth Amendment to the Constitution of the United States.

LIST OF INTERESTED PARTIES

Counsel of record for John E. Chance & Associates, Inc. certify that the following listed parties have an interest in the outcome of this case. These representations are made in order for the Justices of this Court to evaluate possible disqualification or recusal.

1. Marathon Pipeline Company, represented by Henry J. Read and A. Gordon Grant, Jr. of Montgomery, Barnett, Brown & Read, 1800 First NBC Building, New Orleans, LA 70112

2. Sun Oil Company and Sun Gas Company, represented by P. Albert Bienvenu, Jr. and John E. McAuliffe, Jr. of Bienvenu, Foster, Ryan & O'Bannon, 200 Carondelet Street, New Orleans, LA 70130.

3. Rowan Companies, Inc. and the Drilling Rig ROWAN/ODESSA, represented by James E. Blazek and Alan A. Zaunbrecher of Adams & Reese, 4500 One Shell Square, New Orleans, LA 70139, and Ernest A. Carrere, Jr. and James E. Wright, III of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 225 Baronne Street, New Orleans, LA 70112.

4. Twenty Grand Offshore, Inc., Tidewater Marine Services, Inc., the tug EL ZORRO GRANDE, the tug EL JAGUAR GRANDE, and the tug LEOPARDO GRANDE, represented by George W. Healy, III and Richard N. Dicharry of Phelps, Dunbar, Marks, Claverie & Sims, 1300 Hibernia Bank Building, New Orleans, LA 70112.

5. John E. Chance & Associates, Inc., represented by Gene W. Lafitte, Charles M. Steen and Larry M. Roedel of Liskow & Lewis, 50th Floor, One

Shell Square, New Orleans, LA 70139.[1]

[1] The complete list of parent, subsidiary and affiliate companies of John E. Chance & Associates, Inc. as required by Rule 28.1 of the Rules of the United States Supreme Court is: Survey Boats, Inc.

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OPINIONS BELOW

The Opinion and Judgment of the United States District Court for the Eastern District of Louisiana appears in Appendix A and is reported at 527 F.Supp. 824 (E.D. La. 1981).

The decision of the United States Court of Appeals for the Fifth Circuit affirming the District Court's Judgment appears in Appendix B, and is reported at 699 F.2d 240 (5th Cir. 1983).

The decision and Order of the United States Court of Appeals for the Fifth Circuit denying the Petition for Rehearing appears in Appendix C.

JURISDICTION

The jurisdiction of the United States Supreme Court was invoked by petitioner pursuant to 28 U.S.C. 1254(1).

This Opposition to Petition for Writ of Certiorari is being filed within thirty (30) days after receipt of the Petition for Writ of Certiorari as required by Rule 22 of the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1. Rule 615 of the Federal Rules of Evidence—

Rule 615. Exclusion of Witnesses

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence as shown by a party to be essential to the presentation of his cause.

2. The Fifth Amendment to the Constitution of the United States—

> No person shall be held to answer for a capital,

or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

Suit was instituted by Marathon Pipeline Company in the United States District Court for the Eastern District of Louisiana pursuant to the General Maritime Law and the Outer Continental Shelf Lands Act, 43 U.S.C. 1333(b), in accordance with Rule 9(h) of the Federal Rules of Civil Procedure, to recover damages as a consequence of a rupture to its pipeline offshore Louisiana, on August 5, 1978. Suit was instituted against Rowan Companies, Inc., Drilling Rig ROWAN/ODESSA, Tug EL ZORRO GRANDE, Tug EL JAGUAR GRANDE, M/V LEOPARDO GRANDE, Sun Oil Company, Sun Gas Company, Inc., John E. Chance & Associates, Inc., Twenty Grand Offshore, Inc., and Tidewater Marine Service, Inc. The issues of liability and damages were bifurcated, and trial without a jury on the sole issue of liability was conducted on January 14-16, 1981. The District Court entered its Opinion on November 30, 1981 and subsequently rendered Judgment on December 1, 1981, finding petitioner, Rowan Companies, Inc. and its Drilling Rig ROWAN/ODESSA, solely liable to Marathon Pipeline Company. All other defendants were dismissed.

At the commencement of trial, a motion was made to sequester all witnesses. On specific motion of counsel for respondent, John E. Chance & Associates, Inc., the Court excluded Mr. Robert McCary, the rig manager of the ROWAN/ODESSA, who was scheduled to testify. The Court also excluded an employee of respondent, Sun Oil Company, who was to testify. (Appendix D-pp. 4-6 of the Transcript Record of the District Court). Mr. Robert McCary was not employed by petitioner, Rowan Companies, Inc., but rather was employed by a related company, Rowan International, which was not a party to the suit. (Appendix E-p. 539 of the Transcript Record of the District Court).

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit and included a contention that the District Court committed reversible error in sequestering Mr. Robert McCary, for the reason that his exclusion violated Rule 615 of the Federal Rules of Evidence. The Court of Appeals affirmed the District Court Judgment, and also denied the Petition for Rehearing.

ARGUMENT IN SUPPORT OF OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE DISTRICT COURT ACTED PROPERLY WHEN IT SEQUESTERED ALL FACT WITNESSES, PARTICULARLY ONE WHO WAS NOT AN EMPLOYEE OF A PARTY, AND SUCH ACTION DID NOT CONTRAVENE FEDERAL RULE OF EVIDENCE 615 OR THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

In its *per curiam* decision, the United States Court of Appeals for the Fifth Circuit delineated three bases for its

affirmance of the District Court Opinion. (See Appendix B.)

The second basis relied on by the Fifth Circuit is dispositive on its face of the Petition for Writ of Certiorari. As noted by the Court, Mr McCary "was not an employee of the Rowan Companies, Inc., the party to the proceedings." The subject Rule expressly states that exclusion of..." (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney...." is not authorized. No basis exists for suggesting that a non-employee has an absolute right to sit at counsel table. It has previously been recognized that a former owner of a party corporation does not fit within the exception of Rule 615(2), *Varlack v. S.W.C. Caribbean, Inc.*, 550 F.2d 171 (3rd Cir. 1977). It therefore follows that a present employee of a separate, although related, corporation does not fall within the exception.

Prejudice is a necessary ingredient to justify a reversal of the District Court decision pursuant to Rule 615. *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978), *cert. denied*, 446 U.S. 956, 100 S.Ct. 2928 (1980); *Government of Virgin Islands v. Edinborough*, 625 F.2d 472 (3rd Cir. 1980); *NLRB v. Hale Manufacturing Co.*, 570 F.2d 705 (8th Cir. 1978). As noted by the Fifth Circuit, at no time during the course of the trial did petitioner suggest disapproval of the District Court's exclusion of Mr. McCary, and at no time was a suggestion or showing made that the ruling was ultimately prejudicial. In fact, the District Court sequestered all fact witnesses, including an employee of another party (see Appendix D—p. 6 of the Transcript Record of the District Court). No party was given an advantage over another and, certainly, the ultimate outcome was not affected by the exclusion of *all* witnesses.

Petitioner has suggested both evidentiary and constitutional arguments in support of its position. Normally, in such case, the non-constitutional issues should be addressed first to avoid reaching the constitutional issue. *Blum v. Bacon*, 457 U.S. 132, 102 S.Ct. 2355, 72 L.Ed.2d 728 (1982); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981). However, no need exists to address the "due process" issue here since the question raised by petitioner can be resolved by a simple interpretation of Federal Rule of Evidence 615. Moreover, petitioner was not denied access to counsel as was the case in *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78 (1980), cited by petitioner. It was adequately represented at trial and no suggestion is made that its officers could not consult with counsel. Like its belated contention that it was prejudiced, petitioner's suggestion that it was denied due process comes too late and is without merit.

CONCLUSION

For the foregoing reasons, Rule 615 of the Federal Rules of Evidence was not violated. Therefore, petitioner's contention that it was denied due process is also without merit. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE AND CERTIFICATE OF BAR MEMBER

I, Gene W. Lafitte, counsel of record for John E. Chance & Associates, Inc., respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of June, 1983, I served by hand, three (3) copies each of the foregoing Opposition to Petition for Writ of Certiorari on all parties required to be served pursuant to Rule 28 of the rules of the United States Supreme Court, namely, as follows:

James E. Blazek, representing
Rowan Companies, Inc. and the
Drilling Rig ROWAN/ODESSA
Adams & Reese
4500 One Shell Square
New Orleans, Louisiana 70139

Henry J. Read, representing
Marathon Pipeline Company
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P. Albert Bienvenu, Jr., representing
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George W. Healy, III, representing
Twenty Grand Offshore, Inc.,
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the tug EL JAGUAR GRANDE,
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APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARATHON PIPE LINE COMPANY	CIVIL ACTION
VERSUS	NO. 79-403
DRILLING RIG ROWAN/ODESSA, ET AL.	SECTION "K"

OPINION

Plaintiff, Marathon Pipe Line Company ("Marathon"), owner of an eight-inch oil pipeline installed on the floor of the Gulf of Mexico, has brought this suit in admiralty seeking compensation for damage sustained by a portion of the pipeline on August 5, 1978. Defendants are the Drilling Rig ROWAN ODESSA ("ROWAN ODESSA"), *in rem*, and its owner, Rowan Companies, Inc. ("Rowan"), the Tugs EL ZORRO GRANDE ("EL ZORRO"), EL JAGUAR GRANDE ("EL JAGUAR"), LEOPARDO GRANDE ("LEOPARDO"), *in rem*, their owner, Twenty Grand Offshore, Inc. ("Twenty Grand"), their operator, Tidewater Marine Service, Inc. ("Tidewater"), Sun Oil Company ("Sun Oil"), Sun Gas Company ("Sun Gas"), and John E. Chance & Associates, Inc. ("Chance").

Defendants deny liability. Defendants Sun Oil and Sun Gas have cross-claimed against all of the defendant vessels and the other defendants. Defendants Twenty Grand and Tidewater have cross-claimed against defendants Chance and Rowan. Defendant Rowan has cross-claimed against the three defendant tugs, Chance, Twenty Grand, Tidewater and Sun Oil. Defendant Chance has cross-claimed against all defendant vessels and all other defendants.

The matter came on for trial on January 14, 1981, and considered solely the issue of liability; the issue of quantum was reserved. The parties filed post-trial briefs, and the matter was taken under submission. Having thoroughly reviewed the evidence, the memoranda filed by counsel, and the applicable law, the Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT.

1.

At all times pertinent, plaintiff Marathon, a corporation organized under the laws of the State of Delaware, was the owner of an all-welded, seamless, eight-inch diameter submerged oil pipeline. This pipeline ran in a northeast direction, between the Sun Oil "A" platform in East Cameron Block 338 and the Marathon "A" platform in East Cameron Block 321. It extended a distance of 7.34 miles and was constructed and installed on the floor of the Gulf of Mexico in accordance with all permits required by law. The water depth at the northern end of the pipeline ("Block 321") was approximately 210 feet and at the southern end ("Block 338") was approximately 260 feet.

2.

At all times pertinent, defendant Sun Oil was a corporation organized under the laws of the State of Delaware and, on August 4, 1978, was the operator of a lease in East Cameron Block 331. However, Sun Oil had previously obtained the necessary rights to directionally drill a well from East Cameron Block 330 into Block 331 at a proposed location approximately 1500 feet to the east of the Marathon pipeline since the East Cameron Block 331 location was

within a shipping fairway.

3.

On July 31, 1978, Sun Oil contracted with Rowan, a corporation organized under the laws of the State of Delaware, to furnish the ROWAN ODESSA to drill the proposed well. The contract between the parties was prepared by Rowan.

4.

Under the terms of its contract with Rowan, (entitled "Agreement"), Sun Oil agreed to: provide Rowan with a "guidepath" and access to the drillsite location, advise Rowan of any subsurface conditions or obstructions which Rowan might encounter during operations under the agreement, survey and mark locations, and provide towing service.

5.

The contract between Sun Oil and Rowan contained, among other, the following provisions:

> 8. *(b) Operator of Drilling Unit.*
>
> **Contractor shall be solely responsible for the operation of the Rig, including, without limitation, supervising moving operations, positioning on drilling locations as required by Operator, jacking up and jacking down operations, as well as such operations on board the Rig as may be necessary or desirable for the safety of the Rig. Operations under this Agreement will be performed on a 24-hour day basis.**

9. (f) *Indemnity Provisions.*

(1) *Contractor's [Rowan's] Indemnification of Operator [Sun].*

Contractor agrees to protect, defend, indemnify and save Operator and its joint owners harmless from and against all claims, demands and causes of action of every kind and character, without limit and without regard to the cause or causes thereof or the negligence of any party, arising in connection herewith in favor of Contractor's employees, Contractor's subcontractors or their employees, on account of bodily injury, death or damage to property ....

(2) *Operator's Indemnification of Contractor.*

Operator agrees to protect, defend, indemnify and save Contractor harmless from and against all claims, demands and causes of action of every kind and character, without limit and without regard to the cause or causes thereof or the negligence of any party, arising in connection herewith in favor of Operator's employees, Operator's contractors or their employees, other than those identified in 9(f)(1) above, on account of bodily injury, death or damage to property...

12. *Independent Contractor.*

Contractor is an independent Contractor. Neither Contractor, its employees, subcontractors or their employees, are agents or employees of Operator. The entire performance, operations management and control of the Rig and other items of Contractor's equipment shall be under the exclusive control and command of Contractor, and shall be carried out by Contractor with the primary purpose of performing all acts necessary to execute the

work required by the Operator's drilling program for each well, consistent with safety. It shall be the sole exclusive duty of Contractor to determine at all times, whether operations can be safely continued or undertaken, including, without limiting the generality of the foregoing, the duty to determine by Contractor's own inspection that all cargo and items of equipment are loaded and stored in a proper manner and the Rig is suitable to undertake any contemplated operation under the then existing conditions.

6.

In order to determine whether any underwater obstructions existed in the area, Sun Oil relied on information received from Clark Oil Company ("Clark"), which information was compiled by Clark in December of 1976. Sun Oil provided Rowan with a map showing the as-built location of the pipeline; however, the map was lost prior to trial and was never admitted into evidence. Sun Oil engaged the services of Chance to survey and mark the drilling location. In addition, prior to the arrival of the ROWAN ODESSA at the drilling location, Chance, as requested by Sun Oil, placed three (3) marking buoys along the Marathon pipeline, so as to identify its location. Finally, Sun Oil, pursuant to Schedule E(2) of its agreement with Rowan, assumed the cost of the tugs engaged by Rowan to tow the ROWAN ODESSA to location.

7.

The ROWAN ODESSA is a jack-up drilling vessel, official number 579021, measuring 247 feet in length, 200 feet in width, with a hull depth of 26 feet. It has three retractable legs, 410 feet in length, which can be raised or lowered

at a constant rate of 90 feet per hour.

The vessel is not self-propelled and must be towed by other vessels. When being moved, she is under the command of a Rowan employee, variously referred to as the "rig mover" or "rig manager". At all times pertinent, the rig mover was R. G. McCary.

8.

Under the terms of its agreement with Sun Oil, Rowan agreed to: carry out all operations under the agreement with due diligence, in a safe, workmanlike manner and be solely responsible for the operation of the rig, including, without limitation, *supervising moving operations, positioning on drilling locations as required by Operator, jacking-up and jacking-down operations.* (Emphasis supplied).

9.

On August 2, 1978, Rowan contacted Tidewater, requesting three tugs to tow the ROWAN ODESSA from a drillsite off of the Texas Coast to East Cameron Block 330. The towing expense was assumed by Sun Oil pursuant to its agreement with Rowan.

At all times pertinent, the three tugs towing the ROWAN ODESSA to its location in East Cameron Block 330, the EL JAGUAR GRANDE, EL ZORRO GRANDE and LEOPARDO GRANDE, were diesel-powered, documented, ocean-going vessels, owned by defendant Twenty Grand and operated by defendant Tidewater. Pursuant to the contract between Sun Oil and Rowan, and through the use of the three tugs, the ROWAN ODESSA, under McCary's command, was put under tow toward the

designated drillsite on August 3, 1978.

10.

At all times pertinent, defendant Chance was a corporation organized and doing business under the laws of the State of Louisiana.

Sun Oil contracted with Chance for surveying services, and on July 28, 1978, requested that Chance buoy the drilling site. On August 4, 1978, while the ROWAN ODESSA was in tow toward the drilling location, Sun Oil also requested that Chance place marker buoys on the pipeline which was located approximately 1500 feet west of the proposed drillsite. On that date, Chance marked the well location, placed two reference buoys to the northeast and northwest of the site, and placed three buoys on the pipeline directly west of the site.

The three buoys marking the pipeline west of the wellsite were placed at 1500 foot intervals. One was placed due west of the site while the remaining two buoys were placed 1500 feet northeast and southwest of the first buoy. Subsequent surveys indicated that the wellsite and pipeline buoys were placed within expected tolerance limits. Each buoy consisted of one cubic foot piece of styrofoam, topped with an eight-foot cane pole. Attached to each pole was a six-volt battery, non-flashing bulb, and a small black and white flag.

The request to buoy the pipeline was transmitted by telephone from Sun Oil to Chance after the Chance surveyors were offshore. As a result, Chance, in its office, made the calculations necessary to locate the pipeline and radioed the information to its offshore crew.

11.

On board the ROWAN ODESSA during the move was Rowan rig mover, McCary, Rowan toolpusher Lindsey Rogers, Captain Dillman, the rig's marine hull underwriters' representative, Sun Oil's drilling foreman, Richard Oliver, and the Rowan crew. McCary as rig mover was in command of the vessel, while Oliver's duties involved checking the rig's inventory and equipment used for drilling. Although Oliver was responsible for seeing that the rig was properly located on the wellsite, he had nothing to do with with lowering of the rig's legs, or with moving the vessel toward location.

On or about August 2, 1978, Sun Oil obtained from Marathon a map showing the as-built location of the pipeline and its proximity to the drilling location. This map disappeared from the rig after the pipeline was damaged and was never found. It therefore was not produced for trial. On or about August 4, 1978, Sun Oil sent the map to the rig by helicopter, for use by rig personnel. This map was reviewed by McCary, Captain Dillman and Oliver, in the course of the rig move. Oliver testified that, in addition to this map, he had on board yet another chart, which also mysteriously vanished and which also showed the wellsite and its proximity to the pipeline. Oliver testified that the pipeline was shown on their maps as running from the southwest to the northeast, while Dillman and McCary testified that the pipeline appeared to run north to south.

There was considerable testimony concerning the reliance of McCary, Dillman and Oliver upon the siting of the rig inside of a "triangle", created by the Sun Oil, Marathon and Aminoil platforms. The Marathon platform in Block 321 was north of the wellsite while the Sun platform

in Block 330 was southwest of the site. The Aminoil platform was located northeast of the drillsite. Oliver stated that he considered the location of these platforms as visual indicia of an imaginary "triangle" of safety. If the rig was inside of this triangle, it would not contact the pipeline.

The Court finds that the Rowan employees onboard the ROWAN ODESSA and responsible for moving the rig were well aware of the presence of the Marathon pipeline long before arriving at the proposed drillsite.

13.

At approximately 8:00 p.m. on August 4, 1978, the captain of the EL ZORRO GRANDE, Otis Wisdom, was contacted by McCary, who requested that the rig receive one hour's notice prior to arrival in the vicinity of the location so that the rig could begin lowering its legs. At approximately 10:30 p.m., Wisdom informed the rig that the flotilla was approximately one hour from "location", that is, from Block 330. Wisdom was also informed that the "jacking-down" rate of the rig's legs was one and a half feet per minute; he was requested to determine, from the survey boat, what the water depth was at the wellsite. The tug then relayed a depth reading, provided by the survey boat to the rig, of 255 feet. This figure is contrasted with the 249 foot reading which appeared on the Sun Oil "Drilling Program".

The lead tug decided that the flotilla would enter the block to the north, rather than directly to the west of the wellsite. Several witnesses agreed that such an approach would be customary, under these circumstances, to avoid "wiping out" the location buoy.

14.

Chance surveyor Caillier was aboard the Chance survey boat, GULF SURVEYOR, and in radio communication with the rig and its tug boats when the flotilla was several hours away from the wellsite. He communicated to the flotilla that a pipeline was in the vicinity of the wellsite and was told by McCary that he, McCary, was aware of the pipeline's location. He also recalls advising "someone" in the flotilla that the water depth at the wellsite was 255 feet. There was also testimony to the effect that Caillier mentioned, in radio communication to the tugs, which communication was relayed to the rig, that the rig was east of (i.e., had crossed) the pipeline.

15.

The gauge on the ROWAN ODESSA showing the depth to which the rig legs were extended was not in working order. McCary, using numerical markings which appear on each leg, applied a mathematical formula to determine the depth to which the legs were lowered. The ROWAN ODESSA was not equipped with a depth finder, but had, on occasion throughout the move, radioed the tug boats and requested depth readings. The tugs were equipped with fathometers.

There was considerable conflict in the testimony relative to the proper "formula" to be utilized in calculating the leg depth. Oliver testified that he didn't know how it was done; McCary testified that he had explained it to Oliver. McCary stated that one subtracted 39 feet from the number appearing on the rig legs; Dillman indicated at trial that one subtracted 28 feet, but admitted that his deposition testimony on this point was confused. McCary also stated that his mention in deposition of a 45 foot figure was "confused". He conceded, however, that assuming the legs

were lowered continuously starting at 10:30 p.m., they would be at a depth, at 1:00 a.m., of 251 feet. He testified, however, that there was an interruption in the lowering process of approximately 10 minutes duration.

16.

Though the testimony was conflicting on this point, the Court finds that, sometime between 11:30 p.m. and 12:15 a.m. on August 4 and 5, 1978, the flotilla arrived at a location approximately one mile north of the drillsite. McCary then directed the tugs to switch their towing positions and turn the rig so that it could approach the wellsite in a backwards position, in order that the rig's keyway would be directly over the wellsite.

It was while this "turn-around" was in progress that Chance surveyor Caillier boarded the rig and again asked rig personnel Oliver and McCary if they were aware of the pipeline's location. While Caillier testified that McCary responded by saying, "Let the tugs worry about the pipeline", Oliver testified that he did not recall McCary making this response.

17.

The process of lowering the legs, and the decision as to when to do so, was directed by McCary. Though again faced with much conflicting testimony, the Court finds that the leg lowering process could not have begun any later than 10:30 p.m., and, from the evidence presented, may have begun even earlier. This conclusion must result, despite the fact that the log kept by Captain Dillman indicated that the leg lowering did not begin until 11:00 p.m. This log also indicates, and several witnesses corroborated, that at 12:30

p.m., the rig legs had been extended to a depth of 247 feet. McCary testified that the legs were already extended 26 feet when the lowering process began.

Another area of inconsistent recall concerned the depth to which the legs were to be extended as the rig approached the wellsite. Those witnesses who were involved with the wellsite approach were under the impression (an impression created by McCary) that once the tug switch occurred, the legs were to be placed at, and remain, 40 feet off bottom until the rig was quite near the wellsite. Once the rig was somewhere between 200 feet and 1500 feet of the site (again, the recollection of witnesses varies), the legs were to be dropped to a distance of 10 feet off bottom. There was no clear evidence presented (indeed, no one seemed to know) exactly when this 30 foot drop occurred. Oliver and Sun Oil engineer Kathy Jo Hayes stated that they understood from McCary's comments on August 6, 1978, that the legs had remained at the 40 foot height above bottom until the rig was quite near the wellsite, but then also stated that McCary, in a confused fashion, had also mentioned lowering the legs to 10 feet off bottom once the tug switch was accomplished. At any rate, the moving log kept by Captain Dillman shows that, as of 12:30 a.m. on August 5, 1978, the legs were 10 feet off the bottom. Captain Dillman himself testified that the legs were placed 10 feet off the bottom when the rig was one half mile from the wellsite, and that the legs were jacked down continuously once that process was begun.

18.

The gauges measuring pressure on the Marathon pipeline registered a sudden drop sometime between 12:30 a.m. and 12:55 a.m. on August 5, 1978. The ROWAN ODESSA was the only deep draft vessel in the vicinity

at this time, and there was no vessel anchored in the area.

19.

At the point of rupture, the pipeline lay in 242-245 feet of water, and was slightly more than one mile north of the wellsite. The side scan sonar studies of the pipeline conducted by Chance on August 6, 1978, as well as the observations of those divers who examined the damaged pipeline, indicate that "prints" which correlate to the position and shape of the rig legs of the ROWAN ODESSA were found on the pipeline at the point of damage. These tracks cross the pipeline in a generally northwesterly to southeasterly direction at a point between the Marathon and Sun Oil platforms slightly more than one mile north of the proposed well location.

20.

Based on strong circumstantial evidence, the Court finds from a preponderance of all the evidence that the legs of the ROWAN ODESSA struck the Marathon pipeline on August 5, 1978, causing the damage which forms the basis of this complaint.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of this action as an admiralty and maritime claim, and venue is proper in the Eastern District of Louisiana.

II.

Inasmuch as Marathon's pipeline was properly laid, in accordance with required permits, Marathon is not guilty of any fault or neglect which contributed to the damage sustained by the pipeline. *Gray v. Joansson*, 287 F.2d 852 (5th Cir. 1961), *cert. denied*, 368 U.S. 835, 82 S.Ct. 61, 7 L.Ed.2d 36 (1961).

III.

In a case of this nature, where there can be no eyewitnesses to the event causing damage, the facts cannot be found with absolute certainty or beyond a reasonable doubt. The rights of the parties are determined by a preponderance of the evidence, and reliance upon circumstantial evidence which supports the inference of causation and negligence is permissible. *Petition of Potomac Sand and Gravel Co.*, 253 F.Supp. 268 (D.Md. 1966); *So. Pacific v. Commercial Transport Corp.*, 1967 A.M.C. 565 (E.D.La. 1966).

IV.

By virtue of their agreement with Rowan, which agreement was drafted by Rowan's general counsel John Magner, Sun Oil agreed to provide Rowan with a "guidepath" and access to the drilling site. Rowan contends that Sun Oil breached this obligation as the term "guidepath" speaks for itself and is clear and unambiguous. However, at trial no one was able to clearly define the term. Magner testified that he had not placed in the contract a definition of the term and, when asked to define it, he stated he could not. The only witness at trial who attempted to define the term was Rowan's Executive Vice-President Charles W. Yeargain. His definition indicated that, between two points, there were no obstructions. Testimony at trial, however, indicated that the Gulf of Mexico has many subsurface pipelines, and it would be all but impossible to move a drilling rig within the Gulf

without encountering such obstructions. Hence, it is apparent that the term "guidepath" as used in Section 4(c) of the agreement between Rowan and Sun Oil was ambiguous and did not clearly indicate the intent of the parties regarding the obligation thereunder. It follows that such an ambiguous contractual provision must be construed against the party which drafted the agreement. (Rowan). *Transcontinental Gas Pipeline Corp. v. Mobile Drilling Barge MR. CHARLIE,* 294 F.Supp. 1025 (E.D.La. 1968), *aff'd in part, rev'd on other grounds,* 424 F.2d 684 (5th Cir. 1970).

Accordingly, the Court is unable to find that Sun Oil failed to fulfill its contractual duty to provide Rowan with a "guidepath" and access to the drilling site.

In addition to furnishing Rowan with a "guidepath", Sun Oil agreed to advise Rowan of any subsurface conditions or obstructions which Rowan might encounter during operations under the agreement, survey and mark locations, and provide towing service. In fulfillment of these obligations, Sun Oil provided Rowan with a map showing the as-built location of the pipeline and Sun Oil's foreman, Oliver, had yet another chart aboard the rig showing the location of the pipeline relative to the proposed drilling site. In addition, Sun Oil engaged the services of Chance to survey and mark the drilling location and, prior to the rig's arrival on location, had Chance mark the exact location of the pipeline. Finally, Sun Oil assumed the cost of the tugs which were engaged by Rowan to tow the ROWAN ODESSA to the drilling site.

Thus, having found that Rowan was well aware of the existence and location of the Marathon pipeline relative to the wellsite, prior to the arrival of the ROWAN ODESSA on location, the Court concludes that Sun Oil fulfilled all

of its obligations under its agreement with Rowan and that Sun Oil was not negligent in the planning as opposed to the operational aspects of the rig mov. *Contra, Transcontinental, supra.*

V.

In the instant case, a moving vessel, the ROWAN ODESSA, collided with a fixed subsurface object, the Marathon pipeline. When a moving vessel collides with an anchored vessel or a fixed object, there is a presumption the moving vessel is at fault, and the moving vessel bears the burden of rebutting this presumption by showing that it was without fault, or that the collision was caused by the fault of the stationary object, or that it was the result of inevitable accident. *The OREGON,* 158 U.S. 186, 197, 15 S.Ct. 804, 809, 39 L.Ed. 943 (1895); *The CLARITA,* 90 U.S. (23 Wall) 1, 13 23 L.Ed. 146 (1874); *Freeport Sulphur Co. v. S.S. HERMOSA,* 1974 A.M.C. 1315, 368 F.Supp. 952 (E.D.La.1973), *aff'd in pertinent part,* 1977 A.M.C. 508, 526 F.2d 300 (5th Cir. 1976); *Transcontinental, supra.* The presumption of fault on the part of the ROWAN ODESSA in hitting the pipeline has not been overcome. Rowan, the claimant-owner of the ROWAN ODESSA, has not shown that the collision was the result of inevitable accident nor has it shown that the collision was caused by the fault of the stationary object. The fact that the collision occurred required Rowan as owner of the vessel to show that the vessel, and those in charge of her navigation, were without fault. *Transcontinental, supra.*

Turning to the drilling vessel ROWAN ODESSA, the Court has found that the gauge on the vessel showing the depth to which the legs were extended was not in working order during the rig move. This required McCary, her master, to use numerical markings which appear on each leg,

and to apply a mathematical formula to determine the depth to which legs were lowered. Also, the rig was not equipped with a fathometer which would indicate the water depth below the vessel. Thus, the rig, in order to determine the water depth, had to contact the tugs which were equipped with fathometers. However, considering the fact that the rig was being towed, and the towing hawser was approximately 1800 feet in length, the rig would only be advised as to the water depth below the tugs more than one quarter mile away. Therefore, unless the rig was constantly being advised as to the water depth, any attempt by the rig mover to extend the rig legs to a specific depth above the floor of the Gulf at any point would be based on speculation as to the actual water depth below the rig at a given time.

In considering the actions of McCary, the master of the ROWAN ODESSA, the Court concludes that he failed to fully inquire into the location of the pipeline as the rig was nearing the drilling location, notwithstanding the fact that he had in his possession a map showing the as-built location of the pipeline and that the pipeline was marked by the Chance buoys. Testimony indicated that he relied solely upon the siting of the rig within an imaginary "triangle" created by nearby platforms, and did not take special precautions under the circumstances, such as locating the Chance marker buoys or requesting that the Chance survey vessel, the GULF EXPLORER, keep the rig advised as to the pipeline's location.

The Court finds that McCary was also negligent in failing to inquire into the depth of the water at the point where the ROWAN ODESSA crossed the pipeline, approximately one mile north of the proposed drilling location. Testimony indicated that McCary requested that the captain of the EL ZORRO GRANDE inform the rig when the flotilla was

approximately one hour from location so the rig could begin lowering its legs. At approximately 10:30 p.m. the rig was so informed and, thereafter, McCary requested the EL ZORRO GRANDE to determine from the Chance survey vessel the water depth at the wellsite. McCary, however, did not request depth readings at the location where the rig began the jack-down procedure or at any location other than the wellsite, apparently assuming the depth between rig and the wellsite was the same as that at the wellsite (255 feet).

Finally, McCary was negligent in timing the lowering of the rig's legs and in not allowing a reasonable margin of safety relative to the depth to which the legs were to be lowered.

The Court has found that the pipeline lay in 242-245 feet of water at the point of rupture, which rupture occurred approximately one mile north of the wellsite sometime between 12:30 a.m. and 1:00 a.m. on the morning of August 5. Assuming that McCary began to lower the legs at 90 feet per hour at 10:30 p.m., as he testified, and that the vessel had a draft of 26 feet, the legs would, after continuous lowering, have reached a depth, at 1:00 a.m., of 244 feet. The vessel's moving log, however, indicates that, at 12:30 a.m., the legs were 10 feet off bottom at 287 feet "rack". According to Captain Dillman, the legs were then at a depth of 257 feet. Thus, although the testimony was conflicting as to the depth to which the legs were extended, in any event, the margin for safety at the point where the rig crossed the pipeline was 0, instead of the usual 10 to 15 feet.

For the reasons cited hereinabove, any of which, in the Court's opinion, constituted fault on the part of the drilling vessel ROWAN ODESSA and/or her master, McCary, the Court finds that Rowan as claimant-owner has failed

to rebut the presumption that its vessel was at fault in causing the collision with the pipeline and that McCary, her master, was negligent. Accordingly, such fault on the part of the ROWAN ODESSA and those in charge of her navigation was the sole proximate cause of the damage to the Marathon pipeline.

VI.

Plaintiff has named as defendants Tidewater and Twenty Grand, as owner/operator of the three vessels engaged with towing the ROWAN ODESSA to the wellsite. Based on the evidence heard at trial and the applicable law, the Court is convinced that the towing vessels were in no way a contributing proximate cause of the collision with the Marathon pipeline. Virtually every witness testified that the tugs' behavior and navigation were commensurate with that level of care and expertise required of similarly situated towing vessels. It was also generally conceded that the tugs were directed by and subject to the orders of the rig manager, McCary. While the tugs were responsible for the safe conduct of the rig over water to the wellsite, they did not control or direct the movement of the rig's legs. At all times pertinent, the tugs were operating under the direction of McCary. As a result, they cannot be considered the "dominant mind" over their tow.

The "dominant mind" concept was developed to impose liability for a collision on the towing vessel for its faults in navigation, even though the tow may have contributed to the accident. The tug is generally considered the "dominant mind", since it provides the motive power. When, however, the collision is the result of a duty breached by the tow, and not the result of some fault or omission of the tug, the tow may be held solely liable for resulting damages.

Gilmore & Black, *The Law of Admiralty* (2d Ed. 1975), p. 516; *Chevron U.S.A., Inc. v. Progress Marine, Inc.*, 1980 A.M.C. 1637, *aff'd*, 632 F.2d 893 (5th Cir. 1980). *See also Dow Chemical Co. v. Tug THOMAS ALLEN*, 394 F.Supp. 1354 (E.D.La. 1972), wherein it was stated:

> If the tow is the "dominant mind", the tug is not liable provided the tug has obeyed the tow's orders and has not herself been guilty of negligence, either in the manner of executing the orders or by participating in an obviously dangerous maneuver.

Dow Chemical, supra at 1363.

The tugs supplied depth readings to the ROWAN ODESSA throughout most of the move. Though the testimony was somewhat unclear as to whether the tugs possessed a pipeline chart on board, it appears that they did not. While sailing without a chart may render a vessel unseaworthy, the Court concludes that under the facts of this case, the failure of Tidewater and/or Twenty Grand to supply pipeline charts to the tugs was not the proximate cause of the casualty. *Dow Chemicals, supra.* Nor was the tug's relay to the rig of the Chance observation that the flotilla was east of the pipeline a proximate cause of the collision. The tugs were not requested nor under a duty to provide the rig with constant depth readings or to evaluate another party's knowledge of the flotilla's location relative to the pipeline. Rig personnel did not ask the tugs for depth readings or a navigational fix when they crossed the pipeline, as they had at other times during the move. The tugs were aware of the pipeline's presence, but, as numerous witnesses testified, the tugs were not responsible for, or in any way involved in the decision to lower the rig legs. At all times pertinent, the tugs exercised that degree of caution, care

and maritime skill which prudent navigators usually employ in similar undertakings. *United States Fire Insurance Co. v. Gulf States Marine & Mining Co.*, 262 F.2d 565 (5th Cir. 1959); *Chitty v. M/V VALLEY VOYAGER*, 284 F.Supp. 297 (E.D.La. 1968).

VII.

Plaintiff has also named as defendant Chance, the surveyor engaged by Sun Oil to buoy both the drilling location and the Marathon pipeline. Based on the testimony at trial, the Court concludes that Chance performed those services requested of it under its contract with Sun Oil in accordance with the "highest standards" in the industry. The services requested of it were: 1) to buoy the location of the well, and 2) to mark the Marathon pipeline west of location. The surveys undertaken subsequent to the pipeline rupture indicated that the three buoys placed over a 3000 foot area west of the location were placed over the pipeline. The buoy marking the wellsite location was also accurately placed.

It is clear from the testimony at trial that those aboard the rig did not expect the surveyor to "direct" the rig onto location, or to mark the pipeline at the point of crossing. In addition, there was much testimony indicating that the "missing map" aboard the rig was marked to show the three points at which the Chance buoys designated the pipeline. Caillier, the Chance surveyor, when requested by Rowan, provided the rig with the water depth at location. He was not, however, requested to determine the depth at the point where the rig crossed the pipeline.

Thus, Chance, as a service company, did what it was asked to do. It was not required or under a duty to warn an experienced contractor, such as Rowan, of dangers which

Rowan could be presumed to be familiar with, especially in light of Rowan's knowledge of the existence of the pipeline. *Waterbury v. Byron Jackson, Inc.*, 576 F.2d 1095 (5th Cir. 1978). Further, any negligence which the Chance crew may have committed was not a proximate cause of the damage to the pipeline. McCary's reliance upon a comment radioed by Caillier to the tug boats and which was relayed to McCary, to the effect that the rig was east of the pipeline, was misplaced. Notwithstanding this comment, however, it was the leg lowering process directed by McCary and prior to the Chance comment which ultimately caused the damage to the pipeline. Caillier asked rig personnel on at least two different occasions whether they were aware of the existence of the pipeline. The responses were affirmative and rig personnel requested no additional assistance.

VIII.

The court has reviewed the numerous allegations made by Rowan as to the fault of defendants and cross-defendants, Twenty Grand, Tidewater and Chance. However, such allegations have been found to be without merit.

Thus, having determined that Rowan was negligent and that such negligence was the proximate cause of the damage to the Marathon pipeline, the Court now focuses on Rowan's claims for indemnity.

IX.

In the contract between Sun Oil and Rowan, the indemnity provision appearing in Section 9(f)(2) (see Findings of Fact) provides that the Operator (Sun Oil) will indemnify Contractor (Rowan) against all claims arising "*in favor of Operator's employees, Operator's contracators or their*

employees,...on account of bodily injury, death or damage to property". (Emphasis supplied). Since the Court has determined that Rowan is the only party whose negligence caused the damage complained of, and since the claims of Tidewater, Twenty Grand and Chance for indemnity were premised upon the possibility that they might also be found negligent, the Court finds these provisions inoperable. Further, the indemnity provision clearly does not apply to any claim by Rowan for indemnity from Sun Oil based upon the negligence of Rowan. Finally, the contract and indemnity provisions are silent as to indemnity in the event of damage to the property of third parties, such as Marathon. Thus, the Court concludes that Rowan is not entitled to indemnity from Sun Oil pursuant to their contractual obligations.

X.

Rowan argues that it may claim indemnity from Chance under the terms of the following indemnity provision contained in the contract between Sun Oil and Chance:

> INDEMNITY: Contractor [Chance] agrees to protect, defend, indemnify and hold Sun [Sun Oil] and *those* who are joint adventurers, partners, co-owners of the property, or *otherwise associated with Sun in receiving the benefits of the work or services to be rendered or performed hereunder,* and the employees of Sun and of such associates of Sun, free and harmless from and against any and all claims, demands and causes of action of every kind and character from any cause whatsoever by any party hereto, any party acquiring any interest hereunder, any of their agents and employees, and any third or other party whomsoever, or governmental agency, arising out of, incident to, or in connection with this agreement or performance of work or services thereunder or breach of the terms,

> thereof, including without limitation by enumeration all taxes, claims, debts, fines, penalties, forfeitures, patent infringements, loss of use, death, injury and damages to all persons and property, together with the amount of judgments, penalties, interest, court costs, legal and other fees and expenses in connection therewith, regardless of whether the liability therefor is based upon some alleged act or omission of Sun or of Contractor or of some other party.

(Emphasis supplied).

Specifically, Rowan argues that it may claim indemnity from Chance as one who received "benefits of the work or services to be rendered or performed hereunder". The Court rejects this contention. The obligation to indemnify is to be strictly construed, and the status of indemnitee is also interpreted narrowly. *Gulf Oil Corp. v. Mobile Drilling Barge or Vessel Margaret*, 441 F.Supp. 1 (E.D.La. 1975), *aff'd*, 565 F.2d 958 (5th Cir. 1978). Additionally, an indemnity agreement will be held to benefit a particular party only when it is express in that effect, and reflects the clear intent of the parties. *Day v. Odeco*, 353 F.Supp. 1350 (E.D.La. 1973). The Court is not convinced that the above-quoted language expresses the clear intent of the parties [Sun Oil and Chance] to indemnify a contractor such as Rowan for its [Rowan's] own negligence. Rather, the provision when taken as a whole indicates that the phrase "those...otherwise associated with Sun in receiving the benefit..." would include those persons associated or affiliated with Sun Oil enjoying the benefit of the work being performed rather than the contractors such as Rowan who are actually performing the work contracted for. Thus, the Court concludes that Rowan is not entitled to indemnity from Chance pursuant to the contract between Sun Oil and Chance.

Accordingly, IT IS ORDERED that judgment be entered in accordance with this opinion in favor of plaintiff, Marathon Pipe Line Company, and in favor of defendants, Sun Oil Company, Sun Gas Company, John E. Chance and Associates, EL ZORRO GRANDE, EL JAGUAR GRANDE, LEOPARDO GRANDE, *in rem*, Twenty Grand Offshore, Inc., and Tidewater Marine Service, Inc., *in personam*, and against defendant ROWAN ODESSA, *in rem*, and Rowan Companies, Inc., *in personam*. All cross-claims are hereby dismissed, with the amount of damages to be established by Marathon at a subsequent trial of that issue, if parties are unable to stipulate to same.

UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
November 24, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARATHON PIPE LINE COMPANY	CIVIL ACTION
VERSUS	NO. 79-403
DRILLING RIG ROWAN/ODESSA, et al	SECTION "K"

JUDGMENT

This cause came on for trial before the court on a former day, and after hearing testimony of witnesses and considering the evidence adduced, the Court took the matter under submission.

Now, therefore, considering the written reasons of the Court on file herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, Tug El Zorro Grande, *in rem*, Tug El Jaguar Grande, *in rem*, M/V Leopardo Grande, *in rem*, Sun Oil Company, Sun Gas Company, Inc., John E. Chance & Associates, Inc., Twenty Grand Offshore, Inc., and Tidewater Marine Services, Inc., and against plaintiff, Marathon Pipe Line Company, dismissing said plaintiff's complaint with prejudice, each party to bear its own costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all cross claims are hereby Dismissed.

New Orleans, Louisiana, this 1st day of December, 1981.

UNITED STATES DISTRICT JUDGE

APPENDIX "B"

MARATHON PIPE LINE COMPANY,
Plaintiff-Appellee Cross-Appellant,

v.

DRILLING RIG ROWAN/ODESSA,
Rowan Companies, Inc.,
Defendants-Appellants,

v.

Tug El Zorro Grande, et al.,
Defendants-Appellees,

Sun Oil Company, et al.,
Defendants-Appellees, Cross-Appellants.

No. 81-3779

United States Court of Appeals
Fifth Circuit.

Feb. 28, 1983.

Pipe line owner brought suit in admiralty seeking compensation for damage sustained when pipeline was struck by drilling rig as rig was being moved to location of underwater oil well. The District Court, George Arceneaux, Jr., 527 F.Supp. 824, entered judgment in favor of pipe line owner, and an appeal was taken. The Court of Appeals held that sequestration of witness whom drilling rig owner sought to have present in courtroom as its "representative" was not established as successful ground for appeal.

Affirmed.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before JOHNSON, WILLIAMS and JOLLY, Circuit Judges.

PER CURIAM:

We AFFIRM on the basis of the opinion of the district court, 527 F.Supp. 824, with the additional finding which follows.

The district court did not discuss in its opinion an issue which has been raised by the Rowan Companies in its appeal. At the outset of the trial the district court ordered the sequestration of the witnesses, including Mr. Robert G. McCary, who was the person placed in charge of the moving of the drilling rig Rowan/Odessa. Mr. McCary was allowed to remain in the courtroom only after his testimony. Rowan now claims that Mr. McCary was its "designated representative" and, therefore, could not be excluded from the courtroom under Rule 615, Fed.R.Evid.

For any one of three reasons we find that the district court must be affirmed on its sequestration ruling. First, while the record makes it clear that the Rowan Companies stated Mr. McCary was their "representative" before the court placed him under the general order of sequestration, no objection nor claim of violation of the Constitution or laws or of Rule 615, Fed.R.Evid., was lodged by the Rowan Companies. There was not the slightest indication given that Rowan in any way disapproved of the ruling of the trial judge at that time or at any other time while this case was pending in the district court. This, undoubtedly, is why the district court did not refer to this matter in its opinion.

While it is true that Rule 46 of the Fed.R.Civ.P. does not require formal exceptions to rulings or orders of the court, that rule requires that the party must make known "to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." After the objection to McCary's presence was made by another party, Rowan did not make known to the court any action which it desired the court to take. Nor did it object to the action of the court. Reading the record, there is no way that the court could have concluded that Rowan wished to make an issue of its action or disagreed with it in the slightest degree.

Second, on the face of the record McCary was not an employee of the Rowan Companies, Inc., the party to the proceedings. McCary testified on the stand that he was an employee, apparently, of a separate corporation, Rowan International. Rule 615, Fed.R.Evid., requires that to be excepted from sequestration the representative must be "an officer or employee of a party which is not a natural person...." Nothing in the record shows what the relationship was between the Rcwan Companies and Rowan International, nor does it show that McCary actually was an employee of the Rowan Companies, Inc. The record does not establish that the Rowan Companies were entitled to claim McCary as their representative under Rule 615.

Third, even assuming that the district court committed error in sequestering Mr. McCary, there was not the slightest reference to the effect of this sequestration throughout the entire record. The Rowan Companies make no showing that the ruling was prejudicial, and prejudice must be shown to justify reversal. As this Court held in *United States v. Warren*, 578 F.2d 1058, 1076 (5th Cir. 1978) (en banc), the failure to sequester government wit-

nesses, while clearly error, does not require reversal even in a criminal case without proof of prejudice.

We find that defendant Rowan Companies, Inc. have not established as a successful ground for appeal the sequestration of Mr. McCary from the courtroom until he was called as a witness.

AFFIRMED.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-3779

MARATHON PIPE LINE COMPANY,

Plaintiff-Appellee
Cross-Appellant,

versus

DRILLING RIG ROWAN/ODESSA,
ROWAN COMPANIES, INC.,

Defendants-Appellants,

versus

TUG EL ZORRO GRANDE, ET AL.,

Defendants-Appellees,

SUN OIL COMPANY, ET AL.,

Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING

(March 31, 1983)

Before JOHNSON, WILLIAMS and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX "D"

PROCEEDINGS

THE COURT: Are counsel ready?

MR. READ: Plaintiff is ready?

THE COURT: Would you please enter an appearance for the record, Mr. Read.

MR. READ: For the plaintiff, Marathon, Henry Read and Gordon Grant of Montgomery, Barnett, Brown & Read.

MR. BLAZEK: For the Rowan Companies, Jim Blazek, Mr. Ernest Carrere, Alan Zaunbrecher, Jim Wright.

MR. BIENVENU: For Sun Oil Company of Delaware, Albert Bienvenu, Jr. and John McAuliffe.

MR. HEALY: May it please the Court, for Tidewater and Twenty Grand, George Healy and Richard Dicharry.

MR. STEEN: For John Chance & Associates, Charles Steen and Larry Roedel.

THE COURT: Okay, gentlemen. Do you wish the witnesses sequestered?

MR. READ: Yes, your Honor.

MR. STEEN: We would ask that they be sequestered, and I notice that Rowan Company has Mr.

McCary sitting here, apparently as a representative. He's not an officer or representative of the company, and I would suggest that he ought to be sequestered, too.

MR. BLAZEK: We intend to have Mr. McCary here as the client representative in order to assist us in the trial of this case.

THE COURT: Will he testify?

MR. BLAZEK: Yes, sir, he will.

MR. STEEN: He is a key witness, your Honor.

MR. BIENVENU: I join in the objection.

THE COURT: What is his position with the corporation?

MR. BLAZEK: He is the rig manager. That's his official title.

THE COURT: This particular rig, the rig in question?

MR. BLAZEK: Yes, your Honor.

THE COURT: I'm going to order him sequestered until he testifies. All persons who are going to testify in this cause please repair to the hallway and remain there until you are called, and do not discuss this case amongst yourselves while you're waiting to testify.

MR. HEALY: Could we have Mr. Bill West, who has been subpoenaed by, I think, Rowan, and who is in the

courtroom. I think he's going to identify some documents. If anybody has any objection, we'll send him out, too.

MR. BLAZEK: If he's just going to identify documents and not testify to any factual matters—

MR. HEALY: To be safe, you better go out to the hall.

MR. BIENVENU: Mr. Donald Robillard, who is an attorney with the Sun Companies, expects to be here during the trial. However, I might call him concerning the contract, the fact that Rowan drew up the contract. I don't believe he will testify much beyond that. Do you have any objection to that?

MR. BLAZEK: Yes, your Honor.

THE COURT: Fair is fair. Okay, he will be excluded, also.

MR. READ: Your Honor, the plaintiffs have Mr. Harold Miller, division manager of Marathon Pipeline, and he would be our first witness. I don't think he will present any problem. We're going to call him first.

THE COURT: Anyone else?

MR. STEEN: I have one small matter before we commence.

THE COURT: Okay, sir.

MR. STEEN: Your Honor, at the evidentiary hearing or conversation which we had the other day, counsel

for the plaintiffs submitted a pre-trial memorandum, and attached to the pre-trial memorandum was some extracts of some depositions, and as I understood, the purpose of that was essentially to see if we could arrive at some stipulations. Your Honor, as you know, we did not, and I would suggest to the Court that most, if not all, of the witnesses for whom extracts have been

APPENDIX "E"

PROCEEDINGS

THE COURT: Be seated, please. All right, Mr. Blazek.

MR. BLAZEK: I'd like to call Robert McCary, your Honor.

THE COURT: All right.

ROBERT McCARY,

after having been first duly sworn by the Deputy Clerk, testified on his oath as follows:

EXAMINATION BY MR. BLAZEK:

Q Would you state your name for the record, please.

A Robert George McCary.

Q And Mr. McCary, where do you live?

A Metairie, Post Office Box 7493, Metairie.

Q By whom are you employed?

A Rowan. Rowan International.

Q Okay. And what is your job?

A Rig manager.

Q What does a rig manager do?

A He's in charge of all operations of the rig.

Q Okay. Can you tell us just briefly, very shortly, what that entails.

A Well, mechanical, down-hole problems, moving of the rig, and getting it ready to move.

Q Do you limit your activities of just being on the

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